UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE: INCRETIN MIMETICS PRODUCTS LIABILITY LITIGATION	MDL Case No.13md2452 AJB (MDD) As to all related and member cases ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION (Doc. No. 767)

Before the Court is Plaintiffs' motion for reconsideration of the Court's October 6, 2014 Order, (Doc. No. 705), denying Plaintiffs' motion to compel production of adverse event source documents and databases. (Doc. No. 767.) Defendants[1] filed a joint opposition in response to Plaintiffs' motion for reconsideration. (Doc. No. 822.) Pursuant to Civil Local Rule 7.1.d.1, the Court finds the motion suitable for determination on the papers and without oral argument. For the reasons set forth below, the Court **DENIES** Plaintiffs' motion for reconsideration.

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[1] "Defendants" as referenced herein refers to Eli Lilly and Company, Merck Sharp & Dohme Corp., Novo Nordisk Inc., and Amylin Pharmaceuticals, LLC.

I. LEGAL STANDARD

Pursuant to Civil Local Rule 7.1.i.1, a party may apply for reconsideration "[w]henever any motion or any application or petition for any order or other relief has been made to any judge and has been refused in whole or in part . . . ." S.D. Cal. CivLR 7.1. The party seeking reconsideration must show "what new or different facts and circumstances are claimed to exist which did not exist, or were not shown, upon such prior application." *Id.* A court has discretion in granting or denying a motion for reconsideration. *Navajo Nation v. Norris*, 331 F.3d 1041, 1046 (9th Cir. 2003); *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1441 (9th Cir. 2001). Reconsideration is generally appropriate only if the district court "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (citations omitted).

A motion for reconsideration cannot be used to ask a court to rethink what the court has already thought through merely because a party disagrees with the Court's decision. *See Collins v. D.R. Horton, Inc.*, 252 F. Supp. 2d 936, 938 (D. Az. 2003) (citing *United States v. Rezzonico*, 32 F. Supp. 2d 1112, 1116 (D. Az. 1998)). Additionally, under Federal Rule of Civil Procedure 54(b), a district court has authority to reconsider and modify an interlocutory decision for any reason it deems sufficient, however, "a court should generally leave a previous decision undisturbed absent a showing that it either represented clear error or would work a manifest injustice." *Labastida v. McNeil Technologies, Inc.*, No. 10CV1690, 2011 WL 767169, at *1 (S.D. Cal. Feb. 25, 2011).

II. DISCUSSION

Plaintiffs request reconsideration of the October 6, 2014, Order because "the Court's reliance on pre-*Levine* preemption principles as stated in *In re Bextra* and similar cases, and applied by those cases to *Buckman* is a mistake or clear error warranting reconsideration." (Doc. No. 767-1 at 2.) (internal citations omitted). Plaintiffs rely

primarily on three cases, *Wyeth v. Levine*, *Gaeta v. Perrigo Pharmaceuticals*, and *Stengel v. Medtronic*[2] to argue assertions that Defendants allegedly misreported and/or under-reported information to the Food and Drug Administration ("FDA") are not preempted as a matter of law and therefore discovery into such information would be appropriate. Plaintiffs additionally argue adverse events are relevant to both general causation and preemption. (Doc. No. 767-1 at 8-9.)

After thorough consideration of the parties' briefs in support and opposition of this motion, the Court finds Plaintiffs have not demonstrated new facts or applicable law, nor have Plaintiffs established the Court's prior order was in "clear error" or "manifestly unjust." Plaintiffs' initial motion sought to compel production of adverse event source documents and databases; Plaintiffs do not dispute that Defendants have already produced adverse event reports regarding pancreatic cancer.[3] In ruling on the motion to compel, the Court found, as an independent basis for denial, that the time and expense associated with production of source files and databases would likely outweigh any benefit and thus production constituted an undue burden. *See AngioScore, Inc. v. TriReme Med., Inc.*, No. 12 CV 03393, 2014 WL 6706898, at *1 (N.D. Cal. Nov. 25, 2014) ("[a] motion to compel may be denied on the ground that the discovery sought would impose an 'undue burden' on the responding party (*see* FRCP 45(d)(1)) or that its benefits are outweighed by its burdens (FRCP 26(b)(2)(C)(iii)").

As a separate basis for denial of production, the Court concluded that claims the Defendants allegedly misreported and under-reported information to the FDA were preempted based on the principles set forth in *Buckman.*[4] This conclusion is consistent

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[2] *Wyeth v. Levine*, 555 U.S. 555 (2009); *Gaeta v. Perrigo Pharm. Co.*, 630 F.3d 1225 (9th Cir. 2011) cert. granted, judgment vacated sub nom., *L. Perrigo Co. v. Gaeta*, 132 S. Ct. 497 (2011); *Stengel v. Medtronic Inc.*, 704 F.3d 1224, 1226 (9th Cir. 2013) cert. denied, 134 S. Ct. 2839 (2014).

[3] For this reason, Plaintiffs' argument that adverse events reports are relevant to causation is not persuasive in support of production of the underlying source files and databases.

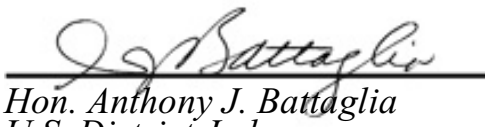
[4] *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001).

with *Wyeth v. Levine*, which establishes the "clear evidence" standard that has governed discovery in this matter. Additionally, the particular context in which Plaintiffs' misreporting and under-reporting claims arise—as a defense to the clear evidence standard as opposed to the basis of the failure to warn claims—distinguishes this case from *Gaeta* and *Stengel*, which Plaintiffs rely upon heavily in support of reconsideration. The Ninth Circuit has similarly relied upon the principles set forth in *Buckman* after *Stengel*, to find a fraud-by-omission claim preempted. *See Perez v. Nidek*, 711 F.3d 1109 (9th Cir. 2013). Recognizing many of the same concerns the Court considered in denying Plaintiffs' motion to compel, the Ninth Circuit maintained both the holding and underlying policy of *Buckman*. Accordingly, the Court is not convinced the reach of *Buckman* is as limited as Plaintiffs contend, even in light of *Levine* and *Stengel*. As the Ninth Circuit has recognized, there is a "narrow gap" through which a plaintiff's claims must fit to escape preemption by the Federal Food Drug and Cosmetics Act,[5] and the Court finds the scope of discovery should be similarly limited.

III. CONCLUSION

For the reasons stated above, the Court **DENIES** Plaintiffs' motion for reconsideration.

DATED: December 9, 2014



Hon. Anthony J. Battaglia
U.S. District Judge

[5] *Perez*, 711 F.3d at 1120 (quoting *In re Medtronic, Inc., Sprint Fidelis Leads Products Liab. Litig.*, 623 F.3d 1200, 1203 (8th Cir. 2010).